U.S. Department of Labor

Board of Alien Labor Certification Appeals
1111 20th Street, N.W.
Washington, D.C. 20036

DATE: February 2, 1989
CASE NO. 88-INA-215

In the Matter of

Apartment Management Company/
Southern Diversified Properties, Inc.
Employer,

on behalf of

Vijay Kalidas Majrekar
Alien

R.W. Foley, Esq.
For the Employer

BEFORE: Litt, Chief Judge; Vittone, Deputy Chief Judge;
and Brenner, DeGregorio, Guill, Schoenfeld, and Tureck
Administrative Law Judges

Nicodemo DeGregorio
Administrative Law Judge

DECISION AND ORDER

This application was submitted by the Employer on behalf of the above-named Alien pursuant to Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(14) (hereinafter "the Act"). The Employer requested review from U.S. Department of Labor Certifying Officer's denial of a labor certification application pursuant to 20 C.F.R. §656.26.[1]

Under Section 212(a)(14) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive a visa unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

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[1] All of the regulations cited in this decision are contained in Title 20 of the Code of Federal Regulations.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of Part 656 of the regulations have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means, in order to make a good faith test of U.S. worker availability.

This review of the denial of a labor certification is based on the record upon which the denial was made, together with the request for review, as contained in an Appeal File ("AF"), and any written arguments of the parties [see §656.27(c)].

Statement of the Case

On January 23, 1987, the Employer filed an application for alien employment, certification (AF 95-135) to enable the Alien to fill the position of Financial Analyst, D.O.T. Code, 160.167-022. Employer, an apartment management company, is located in Atlanta, Georgia. The job requirements listed on ETA Form 750 were a Master of Business Administration Degree in Finance and Accounting; two years of training as a Financial Analyst; and familiarity with Lotus I, II and III and GAAP. On Part B of ETA Form 750, in response to the instruction to list work experience for the Alien for the last three years and other jobs related to the occupation for which the Alien was seeking certification, it was reported that the Alien had worked for the Saga Corporation as a management trainee from September 1983 to March 1984. He had worked in 1984 as an Assistant Manager Trainee or Assistant Store Manager for the Circle K corporation. He has worked for the Employer in Real Estate Management from December 1984 to the time of the application.

Following the issuance of the Notice of Findings ("NOF") on July 17, 1987 by the Certifying Officer ("CO") (AF 18-24), and the Employer's filing of its rebuttal on August 24, 1987 (AF 9-17), the Final Determination denying the certification was issued on January 13, 1988 (AF 3-5).

Discussion

In his NOF the CO stated that documentation submitted on behalf of the Alien showed that he had an MBA degree and 14 months of experience as a management trainee when he was hired by the Employer. While as a trainee the Alien had aquired experience in preparing sales reports and financial statements, there was no evidence that the Alien had two yea s experience as a financial analyst or experience in real estate operations when he was hired by the Employer. The CO properly stated that the job requirements could not include or require the same type experience the Alien had acquired while working for the Employer in that or a similar job. The Employer's requirements were deemed to be in violation of section 656.21 (b)(6). The CO also determined that the employer had violated section 656.21(b)(7) by refusing to hire three U.S. workers for lack of real estate accounting/real property management training or experience and a fourth U.S. worker due to the lack of real estate training or experience and because he lacked training in preparation of financial statements in accordance with GAAP. The CO emphasized

that the Alien did not have the experience for which the four U.S. workers were rejected when he was hired by the employer, and that their rejection could not be considered to have been for lawful job related reasons. The CO's final determination was that the rejected U.S. workers by reason of education, experience or training or by a combination thereof, were able to perform the duties of a financial analyst as the job was customarily performed by U.S. workers similarly employed, which precluded a finding that no qualified U.S. workers were available to perform the duties of the job in question.

The employer's rebuttal evidence included a statement from Ajay Kamat (AF 12) that the Alien had worked for him as a financial analyst from March 1979 to May 1982 where he purportedly prepared financial statements, supervised the accounting staff, made weekly analyses of company investments, conducted internal audits, and handled tax matters. The Alien's mother submitted a statement to the effect that the Alien had worked in the family real estate business, and that part of his duties consisted of preparing financial statements in accordance with the Statements of Auditing Practices which are the equivalent of the U.S. GAAP (AF 13).

In his Final Determination the CO was not persuaded that the Alien had the two years of experience in real estate operations and financial analysis when he was employed by the employer. The CO explained that the information had not been reported when the application had originally been submitted. that no dates had been given for the alleged work in the family real estate business; and that the Alien had previously reported that he was attending the University of Bombay during most of the time he was now listed as having worked for Mr. Kamat as a financial analyst. Additionally, no hours of work were listed for the financial analyst work which was said to have been completed during the years the Alien was attending college.

Under the provisions of subsection 656.27(c), we are limited in the consideration of the evidence to that which was properly submitted to the CO. The additional statements by the Alien's mother and Mr. Kamat which were dated in March 1988 and attached to the Employer's brief will be given no consideration.

Mr. Will Harrell in a statement presented in November 1986 (AF 100-106) in support of the application for certification of the Alien reported that when Apartment Management Company, Inc., was incorporated in December 1984 it was decided that they needed an individual with training in accounting, economics and property management (AF 104). ""We decided to hire an individual with a good accounting background and require them to take . . . training designed to make them proficient in the remaining areas." . . . "It is our opinion that the knowledge received from this program through the end of 1986 has been equivalent to at least ninety hours or six college quarters of classroom training and since it has been largely at the employee's own expense and on his own time, should be considered as formal education such as might be given by correspondence schools rather than on-the-job training. A like replacement for this employee will need like training to adequately fulfill the job duties and responsibilities." Additionally, when the Alien completed Part B of ETA 750 in approximately January 1987 (AF 107), he did not list any prior property management or financial analytic experience, although he was instructed to list any other jobs at which he had worked related to the position for which certification was being sought.

The evidence originally submitted to support the application for certification clearly conflicts with the evidence submitted after the CO issued his NOF. While it is now maintained that the Alien initially misread ETA Form 750, Part B, the assertion that the Alien misread the Form is not plausible. We point to the resume (AF 108) which was prepared and submitted by the Alien concerning his education and work experience. The resume was not prepared at the request of or at the direction of the Department of Labor. Yet, it lists no work experience prior to September 1983, when the Alien went to work for SAGA Corporation.

We agree with the CO that the Employer, in violation of Section 656.21(b)(6), did not list the actual minimum requirements for the job. Accordingly, the denial of certification must be affirmed, and it is not necessary to reach the other issues.

ORDER

The determination of the Certifying Officer denying the Employer's application for labor certification is AFFIRMED.

NICODEMO DeGREGORIO
Administrative Law Judge

Washington, D.C.

ND/pah